



U.S. AGENCY FOR
INTERNATIONAL
DEVELOPMENT

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Guidance for FY 2000 Population Assistance Certification

Section 599D of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2000 (as enacted in Public Law 106-113), requires that certain organizations (hereafter called "covered" organizations) certify they will not engage in specified abortion-related activities, using either USAID or non-USAID funds, during a specified period, in order to be eligible to receive FY 2000 population funds appropriated by PL 106-113 (hereafter "FY 2000 Population Funds"). Although President Clinton has exercised statutory authority to waive this requirement, only a limited amount of funding may be provided under the law—a total of \$15 million for population activities worldwide—to covered organizations that do not certify.

To implement the referenced law, USAID is asking all covered organizations to complete an FY 2000 Population Assistance Certification Form for purposes of receiving FY 2000 Population Funds. The form provides options for organizations to certify (Option No. 1) or decline to certify (Option No. 2). USAID requires prime awardees that expect to receive FY 2000 Population Funds, both U.S. and non-U.S., to identify their covered subawardees at all levels or "tiers" below the prime agreement and request certification forms from those covered organizations. With the information provided by the forms, USAID will determine which organizations may be funded outside the \$15 million cap and which organizations must be funded within the \$15 million cap.

The present guidance is provided to assist intermediary organizations to implement the certification procedure with subawardees and assist covered organizations to complete the Certification Form.

1. Which organizations are "covered" by the certification procedure and will be asked to complete the Certification Form?

- ◆ Private, non-governmental entities, whether non-profit or profit-making, which are organized under the laws of a country other than the United States, and
- ◆ Multilateral (including global or regional) organizations which consist of member states,

that are scheduled to receive FY 2000 Population Funds, either directly from USAID through a prime contract, grant or cooperative agreement, or as subcontractors or subgrantees (hereafter "subawardees").

2. Which organizations are not "covered" by the certification procedure and will not be asked to complete the Certification Form?

Organizations not covered by the certification procedure include all U.S. government and U.S. private, non-governmental organizations and foreign governments. In addition, under the statute, organizations that receive only in-kind assistance (for example, in the form of technical assistance or commodities) are not covered. Also, commercial firms that are not engaged in family planning activities (for example, firms that supply goods and services of an administrative nature, such as suppliers of computer equipment, office supplies, maintenance or printing services) are not required to complete the certification form.

Organizations that will not receive FY 2000 funding are not requested to certify. In some instances, due to pipelines and normal budgetary considerations, organizations receiving FY 1998 or FY 1999 funds are not currently scheduled to receive any FY 2000 funds and therefore will not be asked to certify. However, in making funding decisions, particularly for organizations that do not certify, USAID operating units and prime awardees are to proceed according to current schedules and must not circumvent the certification procedure through use of prior year funds.

3. What is the meaning of the certification provision stating the organization "will not perform abortions..."?

The certifying organization certifies that it will not perform abortions in any foreign country (that is, in any country outside the U.S.), except where the life of the mother would be endangered if the pregnancy were carried to term or in cases of forcible rape or incest. The certification restricts performance of abortion even in countries where abortion is permitted under local law. Provision, consistent with local law, of information or counseling about all pregnancy options is not restricted by the certification. The certification does not restrict organizations from treating injuries or illnesses caused by legal or illegal abortions ("post-abortion care").

4. What does it mean to "not violate the laws of any foreign country concerning the circumstances under which abortion is permitted, regulated or prohibited"?

The certifying organization certifies that it will not engage in any activity that violates the laws of any country outside the U.S., with respect to the circumstances under which abortion is permitted, regulated or prohibited. Organizations should seek the advice of local counsel with respect to the application of local laws to their activities.

Note that organizations that certify are required to comply both with the restriction on performing abortions and the restriction on violating local law. In some countries, for example, where abortion is legal under most circumstances, the former restriction will govern. In others, for example, where abortion is prohibited even in cases of rape and incest, the latter restriction will govern.

5. What does it mean to "engage in activities or efforts to alter the laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited"?

The statutory language quoted here refers to activities or efforts by the organization which are intended to change the laws or policies of foreign governments (or governmental agencies) with respect to the circumstances under which abortion is permitted, regulated, or prohibited. With the exception of item (a) below, this language includes an organization's intentional efforts or activities to alter abortion laws or policies, whether the objective is more restrictive or less restrictive laws or

policies. It does not include activities or efforts which are not intended to alter abortion laws or policies, but which may have that effect.

The quoted language covers the following types of activities and efforts undertaken by an organization:

- Oral or written communications, directed to a country's legislators, government officials, or political candidates, that support proposals or recommendations to alter laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited;
- Public outreach activities or efforts (for example, as reflected in newsletters, editorials or other mass media communications) intended to alter such laws or governmental policies; or
- Organizing meetings, mass demonstrations (e.g., rallies or marches), or media events intended to alter such laws or governmental policies.

The quoted language does not cover certain types of activities or efforts as follows.

a. Statutory language expressly excludes activities and efforts undertaken in opposition to coercive abortion or involuntary sterilization.

b. Also not covered are activities and efforts which are not intended to promote changes in abortion laws or policies, such as:

- i) Research and dissemination of information, including responses to inquiries, on the incidence, causes, or consequences of abortion or the status of existing abortion laws or policies;
- ii) Interactions with legislators or government officials in which the organization is giving or obtaining factual information, provided that such interactions are not part of activities or efforts intended to alter abortion laws or policies; and
- iii) Attendance by an organization's representatives at a meeting concerning altering abortion laws and

policies, provided that such attendance is not part of activities or efforts intended to alter abortion laws or policies;

iv) Sponsorship of a meeting or conference where existing abortion laws and policies are addressed, but where changes in such laws and policies may only be raised and dealt with in an incidental or minimal way;

v) A multilateral organization's response to a request from a member state for information or technical assistance relative to its abortion laws or policies.

c. Certain activities or efforts directed to legislators, government officials, or the public are not covered because they involve engaging in efforts to maintain existing laws or policies or to ensure implementation of existing laws or policies, and therefore are not concerned with altering abortion laws or policies.

d. Certain activities are not covered because they do not involve altering laws or policies concerning the circumstances under which abortion is permitted, regulated or prohibited, such as:

i) activities or efforts intended to alter legal penalties applied to women who obtain abortions (e.g., "decriminalization"); and

ii) activities and efforts related to laws or policies specifically addressing treatment of injuries or illnesses caused by legal or illegal abortions (e.g., "post-abortion care").

e. Some activities are not covered because they do not involve actions by an organization, that is, statements or actions by an individual employee or officer of an organization which are undertaken in a personal capacity and not on behalf of or under the auspices of the organization. An individual, or his or her organization, must take reasonable steps to convey that the statements or actions are undertaken in a personal capacity.

f. Finally, based on the language "engage in activities and efforts," an individual activity or effort that may endorse or otherwise promote changes in abortion laws or

policies but that is of a *de minimis* (that is, minimal or negligible) or incidental nature, would not be covered. Such an activity or effort would not be reasonably intended or expected by the organization to have the effect of altering laws or policies. Examples of such an activity or effort would include:

- i) An incidental statement in a publication, meeting, workshop or communication to the mass media which may endorse changes in abortion laws or policies but is not part of activities or efforts by the organization intended to alter the abortion laws or policies of foreign countries;
- ii) The organization's membership in a network of organizations which may intentionally promote changes in abortion laws or policies, provided such membership does not involve active participation by the organization in such activities or efforts of the network; or
- iii) Any other individual activity or effort of the organization that is incidental or *de minimis* in nature.

6. If an organization certifies, for what time period are abortion-related activities restricted?

A certifying organization is restricted from engaging in abortion-related activities specified in the Certification Form from the date the certifying organization signs an agreement under which it will receive FY 2000 Population Funds through the last date on which such funds are initially available for obligation by USAID, that is, September 30, 2001. The date is September 30, 2001, because FY 2000 funds are initially available for obligation over a two-year period.

7. What if an organization certifies, but does not comply with the terms of the certification?

Option No. 1 on the Certification Form states that the certification is a material fact upon which USAID and intermediary funding organizations rely in providing FY 2000 Population Funds. This means that USAID, and the intermediaries, rely on the truth and accuracy of the certification statement, as an essential or "material"

piece of information, in the decision to provide funds outside the limited \$15 million cap. USAID will require that all agreements, subagreements and related amendments which provide FY 2000 Population Funds include a clause describing the certification procedure and providing standard remedies available when a certifying organization fails to comply with the terms of a certification, such as refund and termination. This is consistent with the way USAID and other federal agencies ensure compliance by contractors, grantees, recipients and subawardees with other certification requirements and is necessary to ensure that the statutory \$15 million funding cap is observed.

8. What if an organization certifies, but never receives FY 2000 population funds?

The certification covers a period beginning on the date an organization signs an agreement to receive FY 2000 population funds. If the organization never signs such an agreement, the certification restrictions will not apply.

9. If a covered organization does not certify, can it still receive FY 2000 funding?

Covered organizations that decline to certify will be considered for financing with FY 2000 Population Funds. However, funding for organizations that do not certify is capped in the aggregate at a total of \$15 million worldwide. If the demand for funds by organizations that do not certify exceeds the \$15 million available, USAID will be required to reduce funds for some or all of these organizations. Organizations that do not certify should be aware of the risk that their FY 2000 funding could be reduced.

10. What if one or more subawardees of an intermediary organization do not certify?

Funds which are passed on to a subawardee that does not certify must count against the \$15 million cap. Accordingly, funding levels for all such subawardees must receive express, written approval by USAID/G/PHN/POP.

Funds provided to a U.S. prime or to a certifying non-U.S. prime for its own use, and funds to subawardees that are not covered or that certify, will not count against the cap.

11. If an organization does not certify and receives USAID funding under the \$15 million, may it engage in the activities identified in Option 1 in the Certification Form?

A non-certifying organization that receives funding under the \$15 million cap may engage in the activities identified in Option 1 in the Certification Form, provided that the activities are not conducted with USAID funds. Non-certifying organizations and all other organizations receiving USAID funds remain subject to abortion-related restrictions in the standard clause/provision on Voluntary Population Activities (March 1999).

12. What if a covered organization does not wish to complete the Certification Form at all?

Organizations do not have to complete the Certification Form. USAID is aware that some organizations may have reservations about the certification procedure or may be concerned about disclosure of the forms and use of the information contained in them. Such organizations may prefer not to complete the form, either to certify or decline to certify. If an organization does not complete the form, it will be non-certifying for purposes of funding decisions.